

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-6105

To be argued by
TERENCE GARGAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6105

BATTERY STEAMSHIP CORP.,

Plaintiff-Appellant,

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL BY BATTERY STEAMSHIP CORP. FROM A
DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE UNITED STATES OF AMERICA

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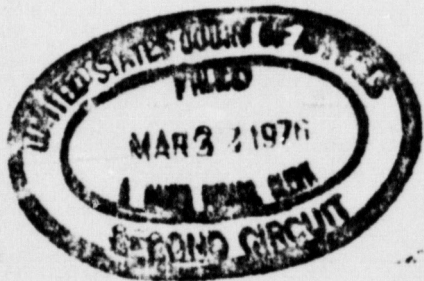


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BATTERY STEAMSHIP CORP.,
Plaintiff-Appellant,
—against—

UNITED STATES OF AMERICA,
Defendant-Appellee.

**BRIEF FOR DEFENDANT-APPELLEE
UNITED STATES OF AMERICA**

Statement of the Issue Presented for Review

Whether the United States is vicariously liable for property damages caused by Refineria Panama S.A., an independent vendor-supplier of fuel oil to Battery's vessel.

Statement of the Case

Nature of the case and proceedings below

This action arose out of collision damage on June 25, 1967 to the S/S ELWELL, a merchant vessel owned and operated by Battery and voyage chartered to the United States.

Battery in its original complaint named the United States as a defendant and later joined Refineria as a

co-defendant. The complaint against Refineria was dismissed on December 8, 1972 as being time-barred.

Thereafter, the case against the United States was dismissed on motion for summary judgment on grounds not relevant to the instant appeal.

The judgment dismissing the case was appealed and this Court remanded the case for further factual determination.

Following the remand, the case was tried on an agreed statement of facts together with submitted depositions, and Judge Metzner again dismissed the case. That opinion is dated August 22, 1975 and is reported only at 1975 AMC 1759.

The instant appeal is from the August 22, 1975 dismissal.

Statement of Facts

On June 25, 1967, the SS ELWELL, owned by Battery and time-chartered to the Government, was damaged as a result of being struck by a barge owned and operated by Refineria Panama S.A. At the time, Refineria was delivering fuel oil to the SS ELWELL in Colon Bay, Panama. (4a)

The Charter Party provided that the owner furnish captain and crew and that the master shall not be under the charterer's orders as regards navigation, care and custody of the vessel or its cargo. (14a)

The Charter further provided that the Government as charterer pay for the fuel used during the charter period.

The fuel could be furnished to the ship in three ways:

1. Battery could purchase the fuel directly, in which case the Government would reimburse Battery for the cost.
2. The Government could cause the fuel to be furnished from independent sources.
3. The Government could furnish the fuel directly from its sources with its own equipment. (12a)

Fuel was furnished to the ship on this occasion under the second method, i.e., the Government requested an outside independent contractor to do the job. (4a)

The fueling operation was conducted under the supervision of the ship's officers. It was performed by employees of Refineria, and no Government personnel were present either on the barge or on the ship before, during or after the operation. (43a)

1. Battery's reliance on *Fairmont v. Chevron*¹ is misplaced.

The holding in *Fairmont* does not change the well-established principle that a party is not vicariously liable for the negligence of an independent contractor.

In *Fairmont*, the Court found that as between *Chevron* and *Fairmont* there was a bargained for obligation on the part of *Chevron* to furnish tug assistance in getting *Fairmont's* ship to the oil dock.

Since *Chevron* obligated itself to furnish tug assistance as part of its contract with *Fairmont*, *Chevron* had

¹ *Fairmont Shipping Corp. v. Chevron International Oil Co., Inc.*, 511 F.2d 1252 (2d Cir. 1975), cert. denied, 44 L.W. 3202.

a non-delegable duty to furnish this assistance in a non-negligent, workmanlike manner.

The fact that Chevron appointed a subcontractor to actually perform the service did not relieve it of the non-delegable duty.

In the same manner, where there is no absolute obligation on the part of the Government to obtain fuel, merely placing an order to a reputable supplier does not cause liability to arise out of the improper acts of the independent supplier.

Judge Hincks in *Todd Shipyards Corp. v. Moran Towing and Transp. Co.*, 247 F.2d 626 (2d Cir. 1957) sheds some light on this agency question.

In this case, Todd Shipyard requested Moran to furnish a tug to move a certain barge. Moran did not have one of its tugs available, so it substituted a tug owned by a third party, S&G Inc., who then negligently damaged the barge while moving it.

The question before the Court was whether S&G's negligence was imputed to Moran or whether Moran was merely a procurer of a tug for Todd.

The Court found Moran to be liable to Todd since it had contracted with Todd to perform the service, and its subcontractor was negligent.

The Court on Page 627 points out:

As to Moran's first contention, the law is clear. If Moran had been a mere broker or an agent of Todd for purposes of procuring a tugboat, then the only obligation upon Moran would have been that of exercising care in the selection of a tug and crew. Once having supplied a competent tug

and crew Moran would not have been liable for their negligent acts. In this situation Moran would have had no control over the operation of S & H No. 2. *The Jungshoved*, 2 Cir., 290 F. 733.

Here the Government did nothing more than arrange for or procure a fuel delivery, which in itself is not claimed to be negligently done.

Therefore, any negligence of Refineria cannot be imputed to the Government. *Peter v. Public Constructors, Inc.*, 368 F.2d 111 (3d Cir. 1968); *Tropea v. Shell Oil Co.*, 307 F.2d 757, 770-771 (2d Cir. 1962).

II. The facts of the case do not support a conclusion that Refineria was a servant or subcontractor of the United States.

In *Kropp v. Douglas Aircraft Co.*, 329 F. Supp. 447 (E.D.N.Y. 1971), the Court set forth several factors to be considered in determining whether one who acts for another is a servant or an independent contractor:

- a. the extent of control exercised by the hirer over the details of the work;
- b. whether the contractor is engaged in a distinct occupation or business;
- c. the skills required for the job;
- d. who supplies the place of work and equipment;
- e. the understanding of the parties. Restatement (2d) of Agency § 220 (1957).

The degree of control exercised by the hirer over the actual operation has emerged as the primary consideration in determining the character of the relationship between hirer and contractor. *Kropp v. Douglas Aircraft Co.*, pg. 468, *supra*.

In the instant case there was no control exerted by the United States over the fueling, nor was any expected. Battery's contention (pg. 8 brief) that the United States exercised control because it directed the ship to Colon Bay would only be relevant if going to Colon Bay were in some way related to the damage suffered.

The control referred to is clearly that control exercised over the actual operation of fueling since that is the act complained of and, as was stated before, the United States was not present at the fueling operation.

The other elements likewise support the argument that no liability under the doctrine of *respondeat superior* can arise.

Refineria was engaged in the business of fueling ships in Panama. Certain distinct skills are necessary to accomplish this end, and Refineria had at its disposal the equipment necessary to do the job.

The understanding of the parties is reflected in the provisions of their charter.

Under the charter, the Government agreed to pay for the fuel and for reasonable incidental costs incurred in loading the fuel. Nowhere in the charter does the United States undertake to be an insurer of the chartered vessel for damage during fueling or to assure responsibility for the torts of the world at large.

Battery should have proceeded diligently against Refineria, a business entity which was subject to the jurisdiction of the District Court for the Southern District of New York. Having failed to do so, it should not be entitled to recovery from the United States.

III. Keeping the SS ELWELL adequately supplied with fuel was mutually beneficial to both Battery and the United States, and Refineria served the interests of both parties.

Battery and the Government were joint venturers in the voyage of the SS ELWELL, both parties deriving certain benefits. Battery was paid charter hire, and the Government was afforded the use of a "bottom" to transport cargo and goods.

Fuel oil supplies were essential to the safe navigation and management of the ship, and both Battery and the United States had a mutual interest in the well being of the ship and its cargo. Neither party had a non-delegable duty to the other to obtain fuel, yet both had the obligation to prevent the ship from running out of oil.

Battery, moreover, had the right under the charter to specify the grade of fuel, and fuel thus furnished was subject to the owner's approval and acceptance. (12a).

Thus, it can hardly be said that Refineria was fulfilling an obligation of the Government's running to Battery. The facts suggest that Refineria was performing a service as an independent party, for the mutual benefit of owner and charterer. Merely placing the order for fuel cannot have the effect of changing the fundamental legal relationship between Battery, the United States and Refineria.

CONCLUSION

The decision of the Court below should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK
COUNTY OF NEW YORK

ss.:

Patricia Miller, being duly sworn, deposes and says;
that deponent is not a party to this action and is over 18 years of age.
That on the 19th day of March 1976, deponent served the within

Brief for Defendant-Appellee
United States of America
upon the attorney(s) for the Plaintiff-Appellant

by depositing a true copy thereof securely enclosed in a franked wrapper, in a post office box regularly maintained by the United States Post Office Department at 26 Federal Plaza, in the Borough of Manhattan, City of New York, addressed to said attorney(s) as follows:

Messrs. Dougherty, Ryan, Mahoney, Pellegrino & Giuffra

576 Fifth Avenue

New York, New York 10036

Attention: Robert Giuffra, Esq.

that being the address designated by said attorney(s) for that purpose.

Sworn to before me this
19th day of March, 1976.

Thomas A. Osborn

THOMAS A. OSBORN
Notary Public, State of New York
No. 41-4622012
Qualified in Queens County
Commission Expires March 30, 1977

Patricia Miller